BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The opinion of the District Court is reported in 58 F. Supp. 724. The opinion of the Circuit Court of Appeals has not been reported. It appears on pages 1101 to 1116 of the Record.

II.

The Court has jurisdiction under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

III.

Statement of the Case.

The case heard by the Circuit Court of Appeals involved an appeal from a judgment entered on January 19, 1945, by the United States District Court for the District of Massachusetts as amended by an order dated January 31, 1945 (R. 96, 98). The judgment of the District Court permanently enjoined all the individual defendants except Ezra D. Hart from serving as a trustee or as an officer of the Aldred Investment Trust and appointed receivers for the Trust. The main question presented by the appeal from the District Court was whether as to each of the individual defendants the evidence warranted a finding that he was guilty of gross abuse of trust within the meaning of Section 36 of the Investment Company Act of 1940. The main question as to the Aldred Investment Trust was whether the judgment appointing the receivers was warranted. This latter question depended in part only upon the question whether as to each of the individual defendants the injunctions against them were warranted. The questions

here presented grow out of the affirmance of the judgment of the District Court by the Circuit Court of Appeals.

IV.

Argument.

1. THE CIRCUIT COURT OF APPEALS MISCONCEIVED THE MEANING OF THE WORDS "GROSS ABUSE OF TRUST" APPEARING IN SECTION 36 OF THE INVESTMENT COMPANY ACT AND THE COURT'S CONCLUSION AS TO EACH OF THE INDIVIDUAL DEFENDANTS (EXCEPT HART) THAT HE WAS GUILTY OF GROSS ABUSE OF TRUST AND SHOULD BE ENJOINED WAS WRONG.

Aldred Investment Trust was established by an Agreement and Declaration of Trust dated November 7, 1927, and this instrument is a part of the printed record on appeal (R. 35). The required brevity of a brief in support of a petition for certiorari prevents an attempt adequately to summarize this instrument. All that can here be stated is that the entire trust estate and the absolute control thereof are vested in the trustees, that in case of any vacancy the remaining trustees have power to fill it provided, however, that the shareholders may by majority vote supersede a trustee or trustees and elect new ones. The trustees are to be five in number and to receive compensation at the rate of $1200 a year (R. 38). The Agreement and Declaration of Trust provides that no investment shall be deemed improper because of its speculative character or because a greater proportion of the trust estate is invested therein than is usual for trustees or by reason of any interest direct or indirect which any trustee may have therein (R. 44). The trustees are authorized to invest the trust estate in securities and obligations of whatever character, "it being the intent that the trustees in their uncontrolled discretion shall have complete freedom in the choice of invest-

ments and reinvestments" (R. 39). The trustees are authorized as owner of any of the trust securities "to exercise all rights of ownership including the right to vote thereon" (R. 39). Provision is made for the issue of shareholders' debentures (R. 55). The holders of the shareholders' debentures are, as we view it, virtually preferred stockholders. At any rate, their claims can be enforced only against the trust property and there is no individual liability on the part of any trustee, officer or shareholder of the trust. The payment of interest on the debentures is in no wise limited to earnings, and the only limitation upon the obligation to pay interest when due is the existence of trust property out of which to pay it.

At its inception the Trust issued $10,000,000 face amount 4½% debentures maturing December 1, 1967. Attached to each debenture was one common share for each $100 principal amount of the debenture. The Trust also issued 112,500 common shares not attached to any debentures. Prior to 1941 the Trust acquired and retired $4,100,000 face amount of debentures, leaving 59,000 shares attached to debentures and 112,500 unattached common shares. In October, 1941, Gordon B. Hanlon acquired by purchase at an auction sale in New York 110,000 unattached shares of the Trust, the total amount of shares then outstanding being 171,500 shares, thus purchasing the controlling shares of the Trust (R. 215, 216). At the time of this purchase the asset value of the Trust was approximately 30% of the face value of the outstanding shareholders' debentures. The cost to Hanlon was approximately $10,000 paid to the seller and approximately another $10,000 in revenue stamps (R. 217).

At a shareholders' meeting held on November 18, 1941, the individual defendants Gordon B. Hanlon, Elton N. Hanlon, Robert P. Loring and Malcolm M. Bowen were elected trustees (R. 987), and except for Gordon B. Hanlon

continued to serve as such until enjoined. On January 30, 1943, the defendant Higbee was elected a trustee. On January 17, 1944, Gordon B. Hanlon resigned as trustee and the defendant Hart was elected in his place. On November 20, 1941, Gordon B. Hanlon became president of the Trust, and on November 25, 1941, the defendant Arnold became treasurer of the Trust, and both continued to serve as such until enjoined. Inasmuch as the decision of the Circuit Court of Appeals bases the conclusion that each of the individual defendants except Hart was guilty of gross abuse of trust upon what the individual defendants received or hoped to receive, a statement as to what they received may here be in order.

Each of the trustees received for his services, which involved careful attention to the affairs of the Trust, the $1200 a year for which the trust instrument provided and nothing more.

Gordon B. Hanlon received for his services as president, which involved the expenditure of a great deal of time taken away from his other business, a salary of $5500, which was increased to $6900 in 1943.

The defendant Arnold, whose qualifications appear in an appendix hereafter referred to, devoted all his time to the treasurership of the Trust, for which he received a salary of $3500 at first and which, when the asset value of the Trust had greatly increased, was raised to $4500 a year.

As secretary of the Trust the defendant Loring received a salary of $300 a year and he devoted a great deal of time to the books and records of the Trust.

For completeness's sake it should be here added that the trustees voted to terminate the office facilities of the Trust located in New York and to establish its business offices in the suite of Gordon B. Hanlon & Co. at 100 Milk Street, Boston, and to pay $410 per month for various facilities and services as follows: rent, light, telephone (local), ste-

nographer, bookkeeper, statistician, statistical, etc., services, miscellaneous facilities (typewriters, etc.), furniture and fixtures (R. 994, 995, 999). There is no finding by either Court that the charge for these facilities was excessive, and the evidence shows that it is less than was paid for like services under the former management. Nor is there any finding by any judge that the salaries above referred to were unreasonable, excessive or not fully earned.

The decision of the Circuit Court of Appeals, as well as that of the District Court, refers to the appearance of Gordon B. Hanlon before the Securities and Exchange Commission in connection with a proposed tentative plan or plans of recapitalization. In January, 1942, when the affairs of the Trust were at a low ebb, the defendant Hanlon desired to bring about a plan of recapitalization which would obviate the necessity of selling securities at depressed prices in order to meet the necessary interest payments. He had a right without resort to the Securities and Exchange Commission to submit such a plan to the security holders, and the Commission had the right to seek a Court injunction against carrying out the plan and to obtain it if the Court should find the plan grossly unfair (15 U.S.C. Sec. 80a-25(c)).

At the time when the employees of the Securities and Exchange Commission were considering the tentative plan and its various modifications, it was their fixed determination, not then made apparent to Hanlon, to prevent any plan going into effect which did not deprive Hanlon of the voting power of the stock which he had bought and paid for. These negotiations began in January, 1942, and while apparently still under consideration Hanlon inquired of the Securities and Exchange Commission as to whether there were any points in the plan of recapitalization which appeared to need additional consideration (R. 970). No acknowledgment of this letter was ever sent, and instead

Hanlon was advised that if he endeavored to carry the plan into effect the Commission would feel it necessary to institute proceedings to enjoin him (R. 971). Thereafter no attempt was made to put the plan into effect. This being the attitude of the Commission, Hanlon, who had already suggested the sterilization, so far as voting power was concerned, of 85,000 shares of his stock (R. 680), took no action looking to the presentation by the trustees of a plan of recapitalization to the security holders. In the course of the proceedings before the Commission Hanlon recommended against liquidation and gave his reasons (R. 909, 910). The reason the Trust was not liquidated was because neither Hanlon nor the other trustees believed that such a course would be in the interest of the Trust, and they were right about it. The asset value of the Trust in January, 1942, was approximately $362 per $1000 debenture. The asset value as of December 30, 1944, was somewhat in excess of $670 per $1000 debenture (R. 829).

The opinion of the Circuit Court of Appeals, after pointing out that Hanlon could not gain by liquidating, goes on to say: "The awareness of this conflict of interest is further suggested by the action of the Trustees in December 1942 when they voted to pay salaries in advance instead of paying them a week after they were due." We do not see exactly how the avoidance of a possible preference under the bankruptcy law shows the awareness of a conflict of interest or constitutes any evidence of gross abuse of trust, and especially where bankruptcy would have caused an irreparable loss to the security holders.

The opinion of the Circuit Court of Appeals next states: "Moreover throughout 1942 and 1943 the Trust engaged in selling securities to meet its running expenses and interest charges.[a] The Court considered this to be a return of capi-

[a] This became unnecessary in 1944 (R. 829, 901).

tal in the guise of interest. It pointed out that no technical act of default could occur so long as the appellants could sell securities and pay out the proceeds as 'ostensible interest', that this left the debenture holders helpless 'under the terms of the debenture instrument to halt the dissipation of assets' and concluded that so long as the 'personal advantage' of the appellants stood in the way, the debenture holders could not expect relief either by way of bona fide recapitalization or liquidation." It is perfectly true that the Trust sold securities to meet running expenses and interest charges. This the Trust was bound to do under the terms of the shareholders' indenture, and we are unable to see how the defendants can be regarded as guilty of an abuse of trust for doing that which they were bound to do. Moreover, Mr. Hanlon had done his best before the Securities and Exchange Commission to get the approval of a plan for recapitalization which would have been in the interest of the debenture shareholders and would have obviated the necessity of the sale in a depressed market of securities for the purpose of paying interest.

The opinion of the Circuit Court of Appeals recites in substance that the Trust purchased the controlling shares of Eastern Racing Association and paid a premium for control. Neither the District Court nor the Circuit Court found that this investment was improper. There was no evidence that any premium for control was paid by the Trustees. It is true that the price paid was greater than the price recently bid over the counter for odd lots of this stock, but the price of $80 a share was in the light of the history of the Association, its earnings and its assets, so low that the District Court would not hear counsel for the defendants upon the subject (R. 1050). Indeed, the facts established by the evidence are that after following for years a policy of liberal depreciation the book value of Eastern Racing stock was well in excess of $80 a share and

its earnings had been steady and large. If it had to go out of business, the liquidation value of each share of stock upon the testimony, not only of the defendants' witness (R. 404-417) but also of the plaintiff's so-called expert (R. 811, 812, 813), would have exceeded the purchase price, and this upon the assumption that all its real estate and buildings were sold for $1. It is not the position of the petitioners that the stock was bought with an intention to liquidate, but consideration of the value of the stock for which it would liquidate in the event of an unexpected loss of the right to do business was an important element in the determination of the safety of the investment. The opinion of the Circuit Court of Appeals says in substance that the Trust, in order to obtain sufficient money to pay for the Eastern Racing Association shares, sold stocks which Hanlon had in 1942 advised against selling. In 1942 the stock of Pennsylvania Water & Power Company was selling in the low 30's and Consolidated Gas, Light & Power Company of Baltimore was selling in the 30's, while when they were sold in the latter part of 1943 or early 1944 the Trust received a price for each of them in the 60's. Hanlon was right in advising against the selling of these securities at 30 when, as it turned out, they were later sold in the 60's, and notwithstanding anything in the opinion of the Circuit Court of Appeals the evidence establishes conclusively the fact that these stocks were sold at the best obtainable price.

The opinion of the Circuit Court of Appeals refers to an application made by Hanlon to the Wage Stabilization Board for the approval of two new executive positions to be held by the former president and former treasurer of the Association and to Hanlon's objection to the action of the Board upon that application. The paragraph of the opinion ends with the statement that "It is apparent from the face of the record that Hanlon's testimony with respect

to salaries was equivocal and evasive." The testimony to which the Court refers appears on pages 290 to 294 of the record and there is nothing equivocal or evasive about it. See in this connection also the testimony of Walter F. Burke, head of the Regional Office, Salary Stabilization Unit, Treasury Department, who was called as a witness by the plaintiff (R. 755).

This Record contains no evidence, direct or indirect, that any of the individual defendants ever received a penny for the services rendered by them to Eastern Racing Association, nor is there any evidence, direct or indirect, that any of them ever expected in the future to receive any compensation from Eastern Racing Association except such as might be a fair return for services rendered. There was plenty of opportunity for the Directors to vote themselves salaries and receive compensation, but this was never done. Had it been done, the Directors would have been guilty of no abuse of trust in their relations either to Eastern Racing Association or to Aldred Investment Trust. We submit that the law upon this subject is that a trustee may receive compensation as an officer of the corporation, shares of which he holds in trust, even though the shares represent a controlling interest in the corporation, if he performs necessary services as such officer and receives no more than proper compensation for such services. See Restatement of the Law of Trusts, sec. 170(n), p. 439. Nor, we submit, is it improper for a trustee or officer of a trust to participate in the acquisition for the trust of a controlling interest in a corporation because of the fact, if it be a fact, that he contemplates becoming an officer of the corporation, performing necessary services for it and receiving reasonable compensation for such services, and this is so even though the trust instrument should say nothing upon the subject. We requested the District Judge so to rule and argued the question in our brief submitted to the

Circuit Court of Appeals, whose opinion contains no direct reference to the request but seems to proceed upon the assumption that it is not the law. Moreover, by the terms of the shareholders' debentures themselves, which refer to the Agreement and Declaration of Trust, the rights of the debenture holders are limited by the provisions of the Declaration of Trust, which provides:

> "No investment or reinvestment shall be deemed improper because of its speculative character or because a greater proportion of the Trust Estate is invested therein than is usual for trustees, or by reason of any interest, direct or indirect, which any Trustee or any Shareholder or any officer of the Trust, or any of them, either individually or in any representative or fiduciary capacity, may have therein, or by reason of any profit that they or any of them may make therefrom," etc. (R. 44, 45).

By virtue of this provision of the trust instrument the defendants had a perfect right to purchase control of Eastern Racing Association even though that purchase might, as it did not, result in a benefit or profit to themselves.

Aldred Investment Trust has been registered with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940 (15 U.S.C. Secs. 80a-8) since October, 1941, as a closed-end, non-diversified management investment company. The Trust's Registration Statement contained the requisite recital of the Trust's policy with reference to concentrating investments in a particular industry or group of industries. Space does not permit an adequate statement of that policy, which may be found beginning with page 879 of the Record. We do not pretend to know whether under the terms of the investment policy there stated a purchase of control of Eastern Racing Association was permissible. Section 13A of the Invest-

ment Company Act provides that no registered investment company shall, unless authorized by the vote of a majority of its outstanding voting security holders, deviate from its policy in respect to concentration of investments in any particular industry or group of industries as recited in its registration statement. Accordingly, it was decided to hold a shareholders' meeting for the purpose, among others, of considering and voting upon future investment policy of the Trust. It was not for the shareholders to determine what investments should be made. It was not for them to decide whether the shares of Eastern Racing Association should be acquired. This, under the Agreement and Declaration of Trust, was a matter solely for the trustees, and the Investment Company Act contains nothing depriving the trustees of this power.

Under date of December 16, 1943, a notice of annual meeting of shareholders was prepared, a copy of which notice appears at page 591 of the Record. It gives notice of a meeting of the shareholders to be held January 24, 1944, for the purpose of taking action upon the following matters:

> "To see if the shareholders will ratify or reject the selection by the Trustees of Touche Niven & Co. as independent public accountants to audit the accounts of the Trust for the calendar year 1944.
>
> "To consider and vote upon future investment policy for the Trust.
>
> "To see if the shareholders will vote to supersede or re-elect the Trustees now in office or any of them or elect a new Trustee or Trustees to fill any vacancy which may exist at the time of the meeting."

The notice is signed by Aldred Investment Trust by R. P. Loring, Secretary. After it had been prepared it was

submitted to the law firm of Putnam, Bell, Dutch & Santry, who had been acting as counsel for the Trust since the fall of 1941 (R. 374), who passed on its legality and who later advised that the purchase of the Eastern Racing Association was perfectly legal and proper (R. 375). The reason for the foregoing statement as to the annual shareholders' meeting and the notice thereof is the most extraordinary manner in which the District Judge and the Circuit Court dealt with this matter. The District Judge found the notice a "masterful bit of understatement" and the Circuit Judge quoted this statement with apparent approval. The opinion of the Circuit Court of Appeals dealing with this aspect of the case shows, we respectfully submit, a misunderstanding of the functions of the trustees and the shareholders under the Agreement and Declaration of Trust. Nor do the Honorable Judges seem to have given consideration to the situation which existed on December 16, 1943, when the notices were sent. At this time there had been only preliminary negotiations for the possible purchase of the Eastern Racing Association stock. No commitment had been made by either side, and so far as appeared no price had been arrived at. A promise had been made to the owners of the stock not to make public the negotiations. If there had been no such promise, it is inconceivable that a prospective purchaser would send out notices broadcasting the fact that the owners of the Eastern Racing Association stock had finally arrived at a point where they were ready to consider selling.

We do not propose to violate the rule as to brevity in this sort of proceeding or waste the time of this Court by here attempting a discussion of what the Court of Appeals has to say about a broker's letter of January 15, 1944, to Aldred Investment Trust or Mr. Arnold's reply thereto. The letters appear on pages 110 and 111 of the Record and justify no such criticism as the District Judge and the

Circuit Judge make of them. Is it conceivable that a prospective purchaser who had no commitment from a prospective seller would write an investment broker that negotiations were in progress and that the seller had at least arrived at a point where he would consider making a sale of his stock? Moreover, we find in the Record no evidence that the trustees as opposed to one of the officers of the Trust ever saw this correspondence. The Trust received an option on the Eastern Racing Association stock on January 24, 1944, and the option was later taken up and the transaction was completed the latter part of February, 1944. The Trust received, under date of March 22, 1944, a letter, not from a debenture holder but from a dealer in investment securities, and the Trust treasurer replied thereto under date of March 25, 1944. These letters appear at pages 1046 and 1047 of the Record. They show that Mr. Arnold, as treasurer of the Trust, entertained the view that furnishing interim information to one security holder but not to all would tend to be inequitable and relatively unfair to the shareholders themselves. In view of the fact that the inquiry came, not from a debenture holder, but from a dealer in investment securities, Mr. Arnold might well have been subject to criticism if he had entertained a different view. It was these very letters to which the Circuit Court of Appeals referred in that portion of its opinion reading: "Even in March after the transaction had been completed the Trustees were following a policy of evasion and equivocation with the debenture holders." As to this statement, perhaps it should here be added that there was no evidence that the trustees knew of this correspondence, and if they had known of it, the correspondence would not have warranted the statement that the trustees were following any course of evasion and equivocation with the debenture holders. The inquiry was not that of a debenture holder, did not purport to be made upon the authority of a deben-

ture holder, but was merely that of a dealer in investment securities.

There is, we submit, in this whole Record no evidence warranting the conclusion that Gordon B. Hanlon, the Trust's president, Robert P. Loring, a trustee and secretary of the Trust, or John L. Arnold, the treasurer of the Trust but not a trustee, failed in any respect to act in the interest of the Trust or was guilty of any abuse of trust. As to them the decision of the Circuit Court of Appeals that they were guilty of gross abuse of trust is clearly wrong. But the so-called relief sought by the plaintiff manifestly could not have been granted unless the other defendants were swept into the case by the following statement appearing in the opinion of the Circuit Court of Appeals, namely: "We are not disposed to question the conclusion of the District Court that 'at all times the Trustees have been subject to Hanlon's wishes and directions'." The Record contains no evidence warranting any such statement.

Thinking that the Court might like to know something of the training and experience of these petitioners as disclosed by the Record, we annex hereto an appendix designed to furnish this information.

2. THE CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT OF THE DISTRICT COURT APPOINTING RECEIVERS EVEN IF IT BE ASSUMED, CONTRARY TO THE FACT, THAT SOME OR ALL OF THE DEFENDANT'S TRUSTEES EXCEPT MR. HART WERE PROPERLY ENJOINED FROM ACTING AS SUCH.

At the outset attention may be called to the fact that Mr. Hart was not enjoined, that Mr. Hanlon still owned a majority of all the voting securities of Aldred Investment Trust, that neither the Court nor the Commission had any power to control his power to elect new trustees, and that accordingly there was no such necessity for the appoint-

ment of receivers as to render such an appointment valid. But there are other reasons why the Court was without power to appoint receivers over Aldred Investment Trust. The Investment Company Act contains no authority for the liquidation of a trust or the appointment of a receiver or trustee for any violation of Section 36 of the Act. That the Congress was aware of its powers in a proper case to provide for liquidation of a trust and the appointment of a trustee is shown in other parts of the Act.

Section 42(e) provides that, if any person is engaged or is about to engage in any act or practice in violation of this title, the Commission may bring an action in the proper court of the United States to enjoin such acts or practices and to enforce compliance with this title.[a]

There is nothing in the first sentence of this section providing for the appointment of a receiver or for an order of liquidation. However, it is significant that this section further provides that, in any proceeding to enforce compliance with Section 7 of the Act, the Court, as a court of equity, may take exclusive jurisdiction of an investment company and shall have jurisdiction to appoint a trustee, who, with the approval of the Court, shall have power to dispose of any or all of the assets subject to such terms and conditions as the Court may prescribe.

It is not alleged in the complaint nor was it contended at the trial that the Aldred Investment Trust has violated the provisions of Section 7, which relates only to unregistered companies. On the contrary, paragraph 1 of the complaint specifically states and the evidence shows that the Aldred Investment Trust was an investment company registered with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940. Thus it is quite obvious that the Congress was not unmindful

[a] The title referred to reads: "Title I—Investment Companies."

of its powers to authorize courts to order a liquidation of a trust because in this subsection (Section 42(e)) it is specifically provided for such liquidation in a proper case. That the Congress specifically limited the powers of the Court under the provisions of the Act to order a liquidation of a trust is further emphasized by the provisions of Section 26(c), wherein it is provided that, whenever the Commission has reason to believe that a unit investment trust (which Aldred is not, see Section 4(2)) is inactive and that its liquidation is in the interest of its security holders, the Commission may file a complaint seeking the liquidation of such trust in the District Court of the United States in any district wherein any trustee of such trust resides. The section further provides that, if the Court determines that such liquidation is in the interest of the security holders of such trust, the Court shall order such liquidation and the distribution of the proceeds to the security holders in such manner as may appear equitable to the Court.

It is only in these two classes of cases that the Investment Company Act authorizes the Commission to bring an action for the liquidation of a trust, and it is apparent that the alleged misconduct of the trustees comes under neither provision.

Section 44, under which the complaint alleges that this action arises, provides that the District Courts of the United States shall have jurisdiction of violations of this title and of all suits in equity or actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title. There is nothing in Section 44 that authorizes either the appointment of a receiver or an order of liquidation of this Trust. Clearly enough the Commission is not empowered under the provisions of the Investment Company Act to bring an action for the appointment of a receiver of an investment trust on the facts

alleged in the complaint and that the District Court had no authority under the provisions of the Act either to appoint a receiver or to enter an order of liquidation and distribution of the assets of the Trust.

The District Judge in his memorandum of decision upon the defendants' motion for dismissal of the complaint denied the motion, saying:

> "It is true that Section 42e of the Investment Act of 1940 specifically authorizes the court to appoint a receiver for violations of Section 7 of that Act, but this is not a limitation upon the powers of a court of equity to appoint a receiver but is, rather, in addition to such powers as are inherent in such a court. Such was the decision of the court in *S.E.C.* v. *Fiscal Fund*, 48 Fed. Supp. 712" (R. 99).

In that case there was no opposition to the appointment of a receiver. The hearing was entirely *ex parte*. In that case the defendant had no management. Four of the five directors had resigned and the president of the company, who was its only director and only officer, was out of the country with the Armed Forces, and therefore unavailable. In the case at bar Mr. Hart, who was not found guilty of any abuse of trust and was not enjoined, is still on the board of trustees, and Mr. Hanlon, as the owner of the voting control of the Trust, has the power, with which no one has any right to interfere, promptly to supersede the enjoined trustees and elect new trustees. Under the circumstances above stated, the Fiscal Fund case can hardly be regarded as sufficient authority for the appointment of receivers in the case at bar. Analogous to the situation here presented are the facts and decision in *Securities & Exchange Commission* v. *Long Island Lighting Company*, decided February 23, 1945, by the Circuit Court

of Appeals for the Second Circuit, 148 Fed. (2d) 252. In that case, the plaintiff sought temporary and permanent injunctions restraining the defendant from consummating a plan for its recapitalization until determination of proceedings pending before the Commission involving the status of the defendant under the Public Utility Holding Act of 1935. The District Court had denied the preliminary injunction on the ground that it lacked power to grant the relief sought. The Circuit Court of Appeals affirmed the decision of the District Court, called attention to the fact that there was no specific grant in the statute of a right to an injunction, and denied that under its general equity powers it had the power to grant the relief sought. In reaching these conclusions, two of the judges of the Circuit Court of Appeals used language particularly germane to the question whether under its general equity powers the District Court in the case at bar had the power to appoint receivers for Aldred Investment Trust.

Judge Simons states:

> "The Commission asserts, however, that it does not rely for its authority to seek relief, upon any specific grant of the statute. It disclaims reliance upon §18 (f) as a basis for the jurisdiction of the court, for that section grants its authority to bring an action in a proper district court of the United States only for acts or practices which constitute or will constitute a violation of the provisions of the Act, or of any rule, regulation, or order thereunder, and it concedes there have been no such violations. It plants itself squarely upon the general equity powers of District Court under §24 of the Judicial Code which extend, *inter alia*, to all suits of a civil nature at common law or in equity, brought by the United States or by any officer thereof authorized by law to suit. In support of its position

it argues that the various branches of the federal government have certain implied and inherent powers which will be exercised, where appropriate, to protect the proper functioning of another branch of the government, that preservation of the *status quo* pending determination, is a traditional aspect of equity jurisdiction, and that the circumstances of the present case amply warrant its exercise to prevent circumvention of the Commission's jurisdiction under the Holding Company Act. It deems it an unnecessary refinement to determine whether particular cases relied on rest upon the fact that the action is brought by the United States or by an officer thereof authorized to sue, or upon the existence of a federal question, or upon the ground that the case falls within §24 (8) of the Judicial Code applicable to 'all suits and proceedings arising under any law regulating commerce'. In seeking injunctive relief the Commission asserts it is asking the court to exercise the same kind of jurisdiction which a federal court would employ to protect its own jurisdiction, and to preserve a *status quo* pending proceedings before another tribunal.

"While the Commission does not base its suit for relief upon any express authority conferred upon it by the Act, but rests its case upon the general equity powers of a federal court, it is not without importance that, by the terms of the Act which purport to provide for a comprehensive scheme for control of practices by public utility holding companies and affiliates affected with a national public interest, the Congress conferred upon the Commission in §18(a) and §11(d), the power to invoke the aid of the courts only to prevent evasions of the Act and non-compliance with the orders of the Commission. There is concededly no power to restrain or discipline holding companies exempt from its pro-

visions. It would seem, therefore, that the guide to statutory construction in the maxim *expressio unius exclusio alterius,* is applicable. Express powers are generally construed to be in negation of powers not expressly granted, and the application of the maxim here is not such an unwarranted use thereof as it was found to be in the *Continental Ill. N.B. & T. Co.* v. *Chi. R.I. Co., supra,* where it required other provisions of law to be ignored."

As above indicated, there was a concurring opinion in *Securities & Exchange Commission* v. *Long Island Lighting Company, supra,* which was written by Judge Hutcheson, who said:

"I concur in all that is said in Judge Simons' excellent opinion. I think, though, that the short and simple answer to appellant's claim of jurisdiction is to be found in the fact that Section 25 . . . of the Public Utility Holding Company Act, which defines the jurisdiction of the federal courts with respect to suits brought by the commission does not grant jurisdiction of a suit of this kind. I write this brief concurrence to say so. I think it may not be doubted that this section and Sections 11 (d) (e) (f) and 18 (d) (f), which state the circumstances and the manner in which the commission can apply to the courts for relief, were intended to be, and are, as to jurisdiction, both inclusive and exclusive. A word by word examination of these sections makes it clear that nothing in them authorizes the suit here brought. Indeed, the commission in its brief disclaims them as the jurisdictional basis of the suit. In my view, this disclaimer, in the light of the settled rule of law that a statutory scheme intended to be all inclusive must be treated as exclusive also, settles

the controversy against the commission. For it is of the essence of such a scheme that what is not included is excluded. The commission, therefore, in asserting a roving commission to sue for, or as, the United States, *In Re: Debs, 158 U.S. 564,* finds itself confronted with the difficulty, inherent in efforts to induce a court of special jurisdiction to embark upon the exercise of jurisdiction, vague in its generality, and general in its vagueness. But this is not all. It finds itself confronted with the one of attempting to sue out of the character with which the law has invested it, of invoking a jurisdiction beyond that to which the statute, by especially defining, has limited it. It seems quite clear to me that unless we are not to abandon in favor of notions completely alien to our system of law, the settled doctrines of federal jurisdiction and of statutory construction prevailing here, we must say: that the commission is the creature of statute; that it lives and moves and has its being by statutory authority alone, and only within statutory confines; that the creature may not say to its creator, 'Why hast thou created me thus?'; and that the commission may not, therefore, by any kind of mysterious metempsychosis, become disembodied from, and disenthralled of, the statute which gives it life, to sue not as creature but as creator, in short, as the United States itself. Because then the statute of its creation does not grant but in effect denies, the jurisdiction invoked, I am in no doubt that the district judge was right and that his judgment should be affirmed."

We submit that the power of appointment of a receiver is a delicate one and is not to be lightly inferred. This is especially true where the Act confers the power to appoint a trustee under some circumstances and fails to confer it under other circumstances. Receivership is a harsh and

drastic remedy and is to be resorted to only under extraordinary circumstances. See also *Hermandos* v. *Puerto Rico*, 118 Fed. (2d) 752, 758, where Judge Magruder, quoting from another case, says:

> "It is perhaps unnecessary to advert to certain well-settled principles governing the appointment of receivers. It is a drastic remedy, and calls for the exercise of the greatest care and judgment; and this is especially true where it is sought to take not only from the parties themselves the management of their own property but property in the hands of a trustee."

In concluding this branch of the brief we respectfully urge that the District Court's appointment of a receiver was clearly erroneous for the following reasons, among others:

(1) The Investment Company Act confers no such power upon the Court.

(2) No such power exists under the general equity powers of the Court.

(3) The defendants were guilty of no gross abuse of trust and should not be deprived of the possession and control of the trust estate which the trust instrument gives them.

(4) Even if, as is contrary to the fact, any defendant was guilty of breach of trust, some of them were not and they should not be deprived of the control of the affairs of the Trust which the trust instrument gives them.

(5) The defendant Hart, one of the trustees of the Trust, has been found guilty of no abuse of trust and is still a trustee.

(6) Gordon B. Hanlon owns a majority of the voting securities of the Trust, and the Court has no power to deprive him of that control and no power to

deprive him of the right to supersede the enjoined trustees with other trustees.

3. THE PORTIONS OF THE RECORD HERETOFORE DISCUSSED AND THE WHOLE RECORD SHOW, WE RESPECTFULLY SUGGEST, THAT THE WRIT SHOULD BE GRANTED FOR EACH OF THE REASONS STATED IN THE PETITION FOR CERTIORARI, WHICH REASONS NEED NOT HERE BE REPEATED BUT ARE EMBODIED HEREIN BY REFERENCE.

Respectfully submitted,

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